Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976
No. A-721

PATRICK JOSEPH SEXTON,

76-1385

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT IN AND FOR COUNTY OF ORANGE, STATE OF CALIFORNIA

ROBERT M. MOSS
6404 Wilshire Boulevard
Suite 1001
Los Angeles, California 90048
(213) 653-8240

Attorney for Petitioner

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Attorney for Petitioner

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Patrick Joseph Sexton, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court in and for the County of Orange, State of California, rendered in this proceeding on November 29, 1976.

OPINION BELOW

No written opinion was rendered by the Appellate Department of the Superior Court in and for the County of Orange, State of California.

JURISDICTION

The judgment of the Appellate Department of the Superior Court was entered on November 29, 1976 (Appendix A, infra). Thereafter, in an effort to exhaust all possible state-court remedies, the petitioner filed a Petition for Rehearing and, alternatively, an Application for Certification and Transfer, each of which were denied on December 10, 1976 (Appendix B, infra). This Petition for Certiorari was filed within the extended time from the date aforesaid.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

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1. Whether the petitioner was denied due process of law, pursuant to the principles expounded in Morrissey v. Brewer, 408 U.S. 471 (1972) because his status in the Lucky Deuce Foundation alcohol rehabilitation program was arbitrarily terminated and revoked without a hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On June 21, 1974, a complaint was issued and filed in the Municipal Court of Central Orange County Judicial District, County of Orange, State of California, charging the petitioner with violating California Vehicle Code §23102(a), commonly known as driving under the influence of alcohol and/or drugs.

At the time of his arraignment, the petitioner and the prosecutor entered into a stipulation in open court whereby the proceedings would be suspended on the condition that the petitioner enroll and participate in an alcohol abuse program entitled the Lucky Deuce Foundation. It was further agreed that should the petitioner successfully complete the program, the complaint against him would be dismissed or the charges reduced. On the other hand, it was additionally stipulated that should the petitioner fail to complete the program, he

would be found guilty as charged and sentenced accordingly.

The program was divided into three phases, of which the petitioner successfully completed phases I and II. However, after 18 months of active involvement in said program, the petitioner was unilaterally terminated therefrom by the program director, ostensibly on the general ground that he did not cooperate and successfully accomplish the final requirements of phase III.

The prosecutor thereupon notified the judge of the Municipal Court wherein the above stipulation was made of the program director's action and further criminal proceedings were activated.

On April 22, 1976, the petitioner appeared before the Honorable Edward Laird, Judge of the Municipal Court, and requested a formal hearing on the issue of whether there was good cause to terminate him from the program.

The court denied the request for a hearing and summarily adjudged the petitioner guilty on the original charge. Imposition of sentence was suspended. The petitioner was placed on probation, on the condition that he violate no law, that he pay a fine and a penalty assessment, and that he spend time in the County Jail. Execution of sentence was stayed to allow the petitioner time within which to seek his appeals.

The petitioner appealed to the Appellate Department of the Superior Court and the judgment of conviction was affirmed (Appendix A, infra).

In an effort to exhaust all possible state court remedies, the petitioner filed a timely Petition for Rehearing and simultaneously filed a timely Application for Certification and Transfer, each of which were denied on Dec. 10, 1976 (Appendix B, infra). Moreover, since there was no written opinion accompanying the Judgment of the Appellate Department of the Superior Court, the petitioner was effectively precluded from seeking any further direct appeal within the criminal justice appellate system of the State of California (Appendix C, infra).

ARGUMENT AND REASONS FOR ALLOWANCE OF WRIT

1. The Decision Below Conflicts with the Decision and Opinion of This Court in Morrissey v. Brewer, infra.

The basic and paramount issue presented in this case is whether the due process principles[1/]

1/ This Court in Morrissey apparently settled on a two-step analysis in applying the dictates of procedural due process in the context of parole revocation. In this regard, Mr. Chief Justice Burger wrote that "once it is determined that

(continued on p. 6)

enunciated by this Court in the landmark case of Morrissey v. Brewer, supra, and its progeny dictate that before the petitioner's status in the alcohol rehabilitation program may be revoked he must be afforded an opportunity to be heard. Obviously this is a question of great importance to the entire criminal justice system and the public. It has never been directly decided by this Court and should be.

In Morrissey, this Court pointed out that parole is "an integral part of the penological system," that its purpose is to help "reintegrate

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1/ (continued from previous page)

due process applies, the question remains what process is due." 408 U.S. at 481.

However, it is the intention and scope of this brief to limit the writing to the subject of whether the interest of the petitioner which is being threatened in this cause is within the contemplation of the liberty or property language of the Fourteenth Amendment.

The remaining issue in the above mentioned two prong test of Morrissey will not be broached herein in that this writer considers that issue in the context of this case to be within the sound discretion of this Court. Suffice it to say, that some type of hearing with an opportunity to present evidence and to confront and cross-examine witnesses should be required.

(people) into society as constructive individuals," and that it alleviates "the costs to society of keeping an individual in prison." This Court therefore, in its wisdom, found that a parolee's liberty was an interest worth protection. 408 U.S. at 477.

The Morrissey rationale has been followed by the California Supreme Court. See, In re Prewitt, 8 Cal. 3d 470, 503 P. 2d 1326, 105 Cal. Rptr. 318 (1972) (parole); and People v. Vickers, 8 Cal. 3d 451, 503 P. 2d 1313, 105 Cal. Rptr. 305 (1972), wherein due process protection was afforded to a person faced with probation revocation.

Furthermore, in the case of In re Charles Bye on Habeas Corpus, 12 Cal. 3d 96, 524 P. 2d 854, 115 Cal. Rptr. 382 (1974), cert. denied 420 U.S. 996 (1974), wherein an individual was committed under a civil addict program, Chief Justice Wright, speaking for a unanimous court, concluded that an outpatient possesses an interest in his liberty which is likewise entitled to the due process protection of a hearing.

In addition, most recently, the California Court of Appeal (Second District) in Kramer v. Municipal Court, 49 Cal. App. 3d 418, 122 Cal. Rptr. 672 (1975), held that a defendant cannot be terminated from a drug diversion program[2]/

2/ Under the Diversion Program, if the defendant decides that he wishes further consideration for diversion, he must waive his

(continued on p. 8)

for cause without an adequate hearing beforehand.

2/ (continued from previous page)

rights to a speedy trial, and then he is referred to the Probation Department for investigation. Upon completion of the investigation, the Probation Department reports its findings to the Court and if the Court orders diversion, further criminal proceedings are stayed against the defendant for a period of six (6) months to two (2) years at the discretion of the Court.

In contrast, pursuant to the Lucky Deuce Program, the defendant ostensibly familiarizes himself with the program by and through an orientation and an interview with program members and officials, and then, if he is agreeable to and is accepted by the program, enters into a stipulation with the Court which is tantamount to a guilty plea. Thereupon, the proceedings are suspended for a period of approximately eighteen (18) months for the defendant to participate in and complete the program.

Thereafter, the defendant under each program, makes intermittent appearances in Court, either personally or by and through his counsel, and the Probation Department or the Lucky Deuce Foundation (whichever is the case) makes a progress or status report to the Court. At the end of the Diversion or Lucky Deuce Program the defendant is ordered to return to the Court for a final determination of his case.

Justice Kaus, writing for the majority, noted the array of due process cases as well as statutes and charters which entitle an individual to a hearing under innumerable circumstances in which the individual may be deprived of something, whether it is his liberty, rights, a license or a job. The Presiding Justice further allowed that common fairness and justice compel the requirement of a hearing as a condition precedent to deprival of a protected right.

Like parole and the various drug diversion programs mentioned above, the alcohol treatment programs such as the Lucky Deuce Foundation have become an integral part of the criminal justice system in California and elsewhere.

It is common knowledge that "the problems of alcoholism and the drinking driver are serious ones for which our society has found no easy solution." Department of Motor Vehicles v. Superior Court, San Mateo County, 58 Cal. App. 3d 936, 940, 130 Cal. Rptr. 311 (1976). Consequently, our system of criminal justice is in the process of implementing and experimenting with alcoholism treatment programs.3/ These programs

3/ In addition to the Lucky Deuce Foundation program in Orange County, other similar programs are cropping up all over the State of California. For example, the California legislature has recently adopted a pilot program in four counties which enables the courts to send a drinking driver to a rehabilitation program as

(continued on p. 10)

are designed to aid in rehabilitation and they reduce the costs of trials and incarceration.

If these programs are to prove viable and credible they cannot be misused or abused. The individuals participating therein must be protected. Accordingly, it is submitted that the due process protections akin to those requirements in the parole revocation context would be the most efficacious and adequate means to challenge any arbitrariness and unreasonableness on the part of these programs.

Moreover, the interest of the petitioner and other persons similarly situated at stake in these programs such as the Lucky Deuce Foundation is the same as that in parole revocations: if the individual is terminated from the program, there will most assuredly be a conviction and a consequent loss of liberty. Thus, the petitioner and like individuals assigned to such local programs for restorative and rehabilitative purposes remain in such programs on a conditional liberty status which should not be arbitrarily revoked without the minimum procedural due process safeguards being afforded.

Thus, it is respectfully submitted that the petitioner's constitutional rights under the due process clause of the Fourteenth Amendment were violated in that he was not allowed a hearing before his status with the Lucky Deuce Foundation program was arbitrarily terminated and revoked.

3/ (continued from previous page)

a condition precedent to keeping his driving privileges (Appendix D, infra).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Appellate Department of the Superior Court.

Resepctfully submitted,

ROBERT M. MOSS

Attorney for Petitioner

APPENDIX A

Entered in the Register of Actions on November 29, 19 76

R. E. St John, County Clerk, by M.M. Cuevas, Deputy

25

APPELLATE DEPARTMENT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff(s) and Respondent, vs. PATRICK JOSEPH SEXTON, Defendant(s) and Appellant.	NO. AP-2065 ON APPEAL from the MUNICIPAL COURT of the ORANGE COUNTY CENTRAL JUDICIAL DISTRICT HON. EDWARD L. LAIRD, JUDGE

This cause having been argued and submitted, and fully considered, judgment is ordered as follows:

It is ORDERED AND ADJUDGED that the judgment of conviction, California Vehicle Code §23102(a) made and entered in the Municipal Court of the above designated Judicial District, County of Orange, State of California, in the above entitled cause be and the same is hereby affirmed

The cause is remanded to the Municipal Court for further proceedings.

Dated this 29th day of November, 19 76.

CHARAMZA, Judge

SPEIRS, Judge

KNEELAND, Presiding Judge

APPENDIX B

FILED
Dec 6 - 1976
William E. St. John,
County Clerk
By_____Deputy

APPELLATE DEPARTMENT
SUPERIOR COURT OF THE STATE OF
CALIFORNIA, COUNTY OF ORANGE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. AP 2065
	)	APPLICATION
	)	FOR CERTIFICA-
VS.	)	TION AND
	)	TRANSFER
PATRICK JOSEPH SEXTON,	)	(Oral Argument
	)	Requested)
	)	

TO THE HONORABLE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OR ORANGE:

The undersigned respectfully applies for Certification of the above-entitled case to the Court of Appeal, State of California pursuant to California Court Rules 62, 63.

The Application is made on the ground that such transfer is necessary to settle important questions of law and to secure uniformity of decision.

Appellant respectfully submits that the following questions are involved in this request for transfer:

1. Whether the constitutional due process principle embodied in Morressey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 C. Ed. 2d 484 (1972) and the many decisions applying it, demanded a hearing before appellant's status as a LUCKY DEUCE FOUNDATION member could be terminated and revoked by the Foundation the trial court.

2. Whether the fact that the LUCKY DEUCE FOUNDATION has been denominated as a private entity should alter the applicability herein of the due process protections enunciated in Morrissey, supra.

3. Whether the trial court action herein constituted State or Governmental action for application of the above-mentioned constitutional principles.

WHEREFORE, Appellant respectfully prays that this Court certify this case to the Court of Appeal.

Dated: December 3, 1976

Respectfully submitted,

/s/ Robert M. Moss
ROBERT M. MOSS,
Attorney for Appellant

F I L E D
Dec 6 1976
William E. St. John,
County Clerk
By_____Deputy

APPELLATE DEPARTMENT
SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. AP 2065
Petitioners,	)	PETITION FOR REHEARING
vs.	)	
PATRICK JOSEPH SEXTON,	)	(Oral Argument Requested)
Defendant	)	

TO THE HONORABLE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE:

Petitioner is the Appellant in the above-entitled cause, which was heard on November 24, 1976, and was decided on November 29, 1976, in favor of Respondent by affirmance of the Judgment of the trial court.

Petitioner requests, pursuant to California Court Rule 107, that said decision and Judgment

be vacated and a rehearing granted in order to prevent a miscarriage of justice.

Petitioner's grounds are as follows:

1. The constitutional due process principles embodied in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 C. Ed. 2d 484 (1972) and the many decisions applying it, demanded a hearing before Appellant's status as a LUCKY DEUCE FOUNDATION member could be terminated and revoked by the Foundation and the trial court.

2. The fact that the LUCKY DEUCE FOUNDATION has been denomiated as a private entity should not alter the applicability herein of the due process protections enunciated in Morrissey, supra.

3. The trial court action herein constituted State or Governmental action for application of the above mentioned constitutional principles.

Petitioner's argument on the foregoing issues is basically as follows:

The Appellant's conditional liberty status which is threatened is an interest within the contemplation of the liberty or property language of the Fourteenth Amendment. This interest has indeed been affected by Governmental action and therefore, should be afforded due process protections. Although LUCKY DEUCE FOUNDATION has been denominated private, this fact should not alter the applicability of due process safeguards to the Appellant's conditional liberty

interest. See also, In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

WHEREFORE, Appellant prays for an Order vacating the Judgment of the Honorable Appellate Department and granting a hearing.

Dated: December 3, 1976

Respectfully submitted,

/s/ Robert M. Moss
ROBERT M. MOSS,
Attorney for Appellant

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. APPELLATE

Court covenend at 10:00 A. M.
DECEMBER 10, 1976 present
Hon. KNEELAND, Presiding, Judge;
H. J. Gallagher Deputy Clerk;
--- , Deputy Sheriff; --- Reporter.

and the following proceedings were had:

AP-2065 PEOPLE vs. SEXTON

Petition for rehearing or in the alternative, Petition for certification to the Court of Appeal having been timely filed and the Court having considered the Petitions and reviewed the record; does now rule: the Petitions and each of them are hereby denied.

ENT. 12-10-76

APPENDIX C

Rule 28. HEARING IN SUPREME COURT

(b) [Time for filing petition] A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of one copy of the petition to the clerk of the Court of Appeal which rendered the decision. When such copy is delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court.

As amended, effective Jan. 1, 1957; Jan. 1, 1959; Jan 2, 1962; Nov. 11, 1966; Jan. 1, 1972.

Rule 62. TRANSFER

(a) [Cases transferable] A Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the Court of Appeal on its own motion determines from an opinion of the appellate

department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law. As amended, effective Nov. 11, 1966.

Rule 63. CERTIFICATION

(a) [Authority to make] The superior court on application of a party or on its own motion may certify that the transfer of a case to the Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. The certificationmay be made by a majority of the judges of the appellate department. When there was a trial in the superior court, the judge who tried the case may make the certification. If any judge of the appellate department who participated in the decision is unable to act on the certification, then a judge designated or assigned to the appellate department by the chairman of the Judicial Council may act in his place. If the judge who tried the case is unable to act, then the certification may be made by a judge designated by the presiding judge or, if there be no presiding judge, by any judge of the court. As amended, effective Nov. 11, 1966; Jan. 1, 1977.

APPENDIX D

Section 13201.5 provides:

"(a) A court may suspend the privilege of any person to operate a motor vehicle, for a period not exceeding six months, upon conviction of driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug.

In the alternative, and in addition to the provisions of subdivision (c) of Section 23102 and the provisions of Section 23102.3, a court may refrain from suspending such privilege if the person convicted of such offense has consented to participate in, for at least one year and in a manner satisfactory to the court, a public or private program for the treatment of problem drinking or alcoholism which, regardless of how it is funded, meets standards established by the Office of Alcohol Program Management, which shall include, but need not be limited to, the following:

(1) Each program shall provide for close and regular supervision of the person, including face-to-face interviews at least once every other calendar week, regarding the person's progress in the program.

(2) The office shall set maximum fees to be charged for participation in the program and shall require that each program make provision for persons who cannot afford such fees in order to enable such persons to participate in such programs.

(3) Each program shall include a variety of treatment services for problem drinkers and alcoholics or shall have the capability of referring such persons to, and regularly and closely supervising such persons while in, appropriate treatment services for their problem drinking or alcoholism.

In utilizing any such program, the court shall require periodic reports concerning the performance of the person participating in a program and the immediate report of any failure of the person to comply with the program's rules and regulations. If, at any time while participating in the program, the person fails to comply with the rules and regulations of the program, the court, upon finding such fact, shall immediately suspend, or order suspension or revocation of, the privilege of such person to operate a motor vehicle for the period prescribed by law.

No person may be admitted into a program for the treatment of problem drinking or alcoholism pursuant to this section more than once.

The provisions of this section afford a rehabilitative program for problem drinkers

or alcoholics that is in addition to any other program or procedure relating to treatment of drinking drivers established in the criminal justice system, and the provisions of this section shall not be construed to restrict or supersede such programs or procedures, nor to prevent the future establishment of similar programs or procedures.

Further, the provisions of this subdivision shall not be construed as requiring a court, upon a first conviction of a person for driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug, to suspend the privilege of that person to operate a motor vehicle if the court finds that a program for the treatment of problem drinking or alcoholism is not appropriate for such a person and if such person has consented to participate in, and does participate in and successfully completes, a driver improvement program designated by the court, as provided in subdivision (c) of Section 23102.

(b) In order to determine which types of programs can most effectively provide for treatment of persons convicted of such offenses, this section shall be implemented during the period from January 1, 1976, through December 31, 1977, on a demonstration basis in four or fewer counties deemed most appropriate for that purpose by the office. The office shall approve several types of programs in such counties in order to prepare for effective implementation of this section statewide. This section shall be applicable in all counties commencing January 1, 1978."

Section 13352.5 provides:

"(a) The department may not suspend or revoke, pursuant to subdivision (a), (c), or (e) of Section 13352 or any other provision of law, the privilege of any person to operate a motor vehicle upon a conviction or finding that the person was driving while under the influence of intoxicating liquor or under the combined influence of intoxicating liquor and any drug, if the court has certified to the department that such person has consented to participate for at least one year, and is participating, in a manner satisfactory to the court, in a public or private program for the treatment of problem drinking or alcoholism pursuant to the provisions of Section 13201.5 or, with respect to a first conviction of such offense, in a driver improvement program designated by the court, as provided in subdivision (c) of Section 23102.

(b) All abstracts of record showing such a conviction that are forwarded to the department pursuant to Section 1803 shall indicate whether the person convicted has consented to participate, and is participating, in such a program for the treatment of problem drinking or alcoholism or such a driver improvement program."

3. The four demonstration counties are Kern, Ventura, Yuba and Santa Clara.